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Supreme Court, U.S.
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No. 96-57

In The

# Supreme Court of the United States

October Term, 1995

ANDREW C. SCHIFFER,

*Petitioner,*

vs.

TARRYTOWN BOAT CLUB, INC., and its BOARD OF DIRECTORS individually, JOHN MILLAR, KEVIN McDERMOTT, ROBERT ROSSI, EDWARD THOMAS, DONALD BRAINARD, THOMAS KENEALY, ANTHONY ISMAILOFF, and JOHN PUFF,

*Respondents.*

**On Petition For A Writ Of Certiorari To New York State Court Of Appeals**

## BRIEF IN OPPOSITION

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30 pp

## QUESTIONS PRESENTED FOR REVIEW

Respondent respectfully submits that there are no federal questions for this honorable court to review in this matter. Petitioner's "questions presented" make no sense and, certainly, present no question of federal law.

## LIST OF ALL PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all the parties. In his brief the Petitioner adds a restaurant, "Dockside of Tarrytown, Inc." which was never a party to this action. Respondent objects to the addition of this non-party as a party to the proceeding.

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2) January 16, 1996 New York State Court of Appeals Order Dismissing Appeal as of Right: Schiffer v. Tarrytown Boat Club, 87 NY2d 916, 641 NYS2d 594 (January, 1996).

3) December 15, 1995 New York State Supreme Court, Appellate Division, Second Department Decision and Order Denying Reargument: Schiffer v. Tarrytown Boat Club, __ AD2d __, __ NYS2d __ (2d Dept., 1995).

4) September 25, 1995 New York State Supreme Court, Appellate Division, Second Department Decision and Order Affirming Supreme Court, Westchester County: Schiffer v. Tarrytown Boat Club, 1995 NYSlipOp 08437.

5) November 23, 1993 New York State Supreme Court, Westchester County Decision and Order granting Defendant/Respondent Summary Judgment: Not Published.

## BASIS FOR JURISDICTION

This court does not have jurisdiction over this matter and for this reason alone the Petition for Writ of Certiorari must be denied. Petitioner states at Page 2 of his brief in the second paragraph under the heading "Statement of Jurisdiction":

> New York State Court of Appeals' order denying reargument was entered on March 28, 1996 (App. A, 1a). This petition is timely filed on or before June 26, 1996: within 90 days after March 28, 1996. *Rule* 13.1.

Petitioner improperly appeals from an order denying reargument, not from the judgment entered by the New York State Court of Appeals, the state court of last resort. The judgment was entered on January 16, 1996 and is reproduced in Petitioner's Brief at App. B, 2a. The memorandum is published at the following citation: Schiffer v. Tarrytown Boat Club, 87 NY2d 916, 641 NYS2d 594 (January, 1996). Clearly, the Petition for Writ of Certiorari was filed more than 90 days after the judgment or order was entered.

Further, even if the Petition were timely filed, Petitioner has not raised a federal question. Difficult as it is to decipher, Petitioner's argument seems to be that because he lost on the procedural and substantive law of New York State, this court should review and declare the relevant law is unlawful, thus enabling him to succeed in this matter.

When we were children there always seemed to be a playmate who, upon losing, would claim the sun was in his eyes, or the ball hit the telephone wire, or there was a slippery spot on the floor, or her shoe came untied, and would demand a "do-over." We are no longer children and in life there is no "do-over" when a panel of judges properly applies the law and rules against us.

Certainly, this court has more pressing issues to consider. Reading the decision of the Appellate Division, Second Department reproduced in Petitioner's brief at App. D, 4a, it is clear no constitutional question was raised at that initial level of appeal. In fact, Petitioner first raised a constitutional question on motion to the Appellate Division for reargument of the appeal. At that time he claimed he was deprived of property by the Defendant-respondents' violation of the Fourteenth Amendment and 42 U.S.C. § 1983.

Respondent herein opposed Petitioner's constitutional claim at that time and argued to the Appellate Division that the Fourteenth Amendment due process clause applies to the state and not to private actors. The Appellate Division denied the motion to reargue with costs. *See* Petitioner's brief at App. C, 3a. It is not the usual procedure for the Appellate Division to order costs.

Petitioner then sought review by the New York State Court of Appeals, claiming the same constitutional question. The procedure in the Court of Appeals is for the Respondent to file a Jurisdictional Letter with the court upon a party filing a notice of appeal as a matter of right (as Petitioner did below, claiming a constitutional question). A Jurisdictional Letter opposing jurisdiction was filed by Respondent herein and the Court of Appeals dismissed the appeal *sua sponte* at that early stage because there was no "substantial constitutional question" giving rise to jurisdiction. *See* Petitioner's brief, App. B, 2a; Schiffer v. Tarrytown Boat Club, 87 NY2d 916 at 916, 641 NYS2d 594 (January, 1996).

Now, in his Petition for Writ of Certiorari, Petitioner appears to be raising a new argument claiming it advances a federal question. This is the first time, in this Petition for Writ of Certiorari, that Petitioner raises this new argument and that reason alone is enough to disallow it. However, even if the court considers this new argument, it must agree that it utterly fails to raise a federal question.

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

The Fourteenth Amendment to the U.S. Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., Amend XIV.

Title 42 U.S.C. section 1983 reads in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. section 1983

## CONCISE STATEMENT OF THE CASE

In early 1991 the petitioner was Commodore of the Tarrytown Boat Club (hereinafter "TBC"). As such he was a member of the TBC's Board of Governors. The various respondents herein were also members of the TBC's Board of Governors. Respondent KENEALY, in addition to being a member of the Board of Governors was the House Chairman and a former Commodore of the Club.

A major project undertaken in 1991 was renovation of the TBC's restaurant and bar which came under the purview and responsibility of respondent KENEALY as House Chairman. The Commodore of the TBC, being an architect by profession, took it upon himself to personally oversee the renovations.

At the regular members' meeting on April 22, 1991, respondent KENEALY made a motion, seconded by seven other board members, relating to the issuance of shares in TBC to its members. This motion was unrelated to the renovations being undertaken at the time, although this was an existing irritation between the petitioner and respondent KENEALY. This motion resulted in a lengthy discussion and, rather than put the motion to a vote, petitioner, then Commodore, tabled the motion. Respondent KENEALY felt the motion was improperly tabled by Petitioner and called the Petitioner a "shit commodore." This comment was made more than a year prior to the institution of the instant action.

On April 26, 1991, at what is believed to be the instigation of petitioner, twelve members of the TBC served written notice to petitioner asking for a special meeting to consider expelling respondent KENEALY from the TBC for use of profanity and slanderous statements. Presumably in response thereto, on April 27, 1991, petitioner, without notice to or concurrence of the Board of Directors, sent a letter to respondent KENEALY suspending him from the TBC for abuse of the Commodore, profanity, and slander

against the Commodore and on the same date the petitioner called a special meeting for May 9, 1991 to consider the possible expulsion of respondent KENEALY.

Petitioner undertook this ultra vires action knowing full well that he did not have the support of, nor the authority of, the Board of Governors to take such action. Upon learning of Petitioner's intentions, the Board of Governors called a special meeting on May 2, 1991 to review the issue of the suspension of respondent KENEALY by the petitioner. After much discussion, it was voted that the suspension be rescinded, respondent KENEALY be asked to apologize to Petitioner, and a letter of reprimand be sent to respondent KENEALY. Consistent therewith, on May 3, 1991 an apology was delivered by respondent KENEALY.

The renovations to the clubhouse apparently resulted in tension developing between the TBC and the entity renting the restaurant from the TBC, to wit, DOCKSIDE AT TARRYTOWN, INC. (hereinafter referred to as "DOCKSIDE"). Sometime in the end of September, 1991 DOCKSIDE initiated litigation against the TBC in the Supreme Court, Westchester County.

On October 9, 1991 a special meeting of the Board of Governors was called to discuss the litigation with DOCKSIDE. Several members of the Board were concerned that a member or members of the Board of Governors might be aiding DOCKSIDE in its litigation against the TBC. To ensure that each member of the Board was aware of where their loyalties should lie and to ensure that a united front was maintained for this litigation, each attested to the following:

> 1) no member of the Board will participate in any discussions with the Dockside and/or its attorneys pertaining to the litigation;

2) no member of the Board will conspire with the Dockside to aid and abet the litigation; and

3) no member of the Board has provided any information to the Dockside and/or its attorneys regarding the September 23, 1991 meeting of the Club.

Present at this meeting was the petitioner herein, ANDREW SCHIFFER, who subscribed his name to this resolution, dated 9 October 1992.

Despite his position of trust as Commodore, and without notification to any of the members of the Board of Governors, on October 30, 1991 the petitioner signed an affidavit knowing that same would be submitted on behalf of DOCKSIDE in its litigation with the TBC. A cursory review of the affidavit illustrates that the allegations made therein are no more than personal attacks on respondent KENEALY.

Upon learning of the existence of this affidavit a special meeting of the Board of Governors was held on November 3, 1991 and the petitioner was suspended for violating his fiduciary responsibility to the TBC and its members; by effectively entering into litigation against the club in violation of its by-laws and endangering the welfare of the TBC by his actions.

A product of that meeting of the Board of Governors was that on November 4, 1991 a letter was sent to the General Membership informing it of petitioner's suspension and a meeting was scheduled for November 11, 1991 to consider petitioner's expulsion from the TBC. On the same date a letter was sent to the petitioner informing him of his suspension and the November 11 meeting. A notice of the meeting was also posted in the private meeting room of the Club.

On November 11, 1991, at a special meeting of the regular members of the TBC the issue of petitioner's conduct was

undertaken and, upon a vote of 43 to 13 with 2 abstentions, the charges against petitioner were sustained and petitioner was forthwith expelled from the TBC.

Of significant note is that on November 13, 1991 a letter was sent to the petitioner informing him of his expulsion. No action, within the 4 month period provided for in New York Civil Practice Law and Rules Article 78 was ever taken by petitioner, nor did he ever request that the membership, in any capacity review the determination to expel him.

Petitioner's full treachery and deceit was not known at the time and has only now come to full light. As a result of a conflict between counsel for DOCKSIDE and its client a motion to be relieved as counsel was made. A copy of that motion, which included the timeslips of work performed by that firm is included in the record.

It is only upon review of those timeslips that the full measure of Petitioner's betrayal of his position of trust and authority can be appreciated. Petitioner's conduct was not an isolated incident, but an intentional and continuous course of conduct, without notice to the Board of Directors of the TBC.

## SUMMARY OF ARGUMENT

At the appellate level below Petitioner alleged he was deprived of property by the Respondents' violation of the Fourteenth Amendment and 42 U.S.C. sec. 1983.[1] Defendant-respondents contend that this argument is untenable and that it demonstrates a serious misunderstanding of both Constitutional and Federal Civil Rights Law. Petitioner seemingly abandons this argument before this Court; however, should the Court decide to consider this argument, Respondents' opposition is briefed at Point II below.

In his Petition for a Writ of Certiorari Petitioner advances a new argument. He seems to be claiming that the New York State courts were somehow deceived into misunderstanding New York State law. This deception caused the state courts to dismiss Petitioner's case. This is an incredible argument and it certainly takes quite a bit of nerve to advance it before the United States Supreme Court. Of course, Respondents disavow any deception and in Point I below will show that Petitioner is actually trying to have this Court review the proper application of well-settled New York State law by our state's extremely competent judiciary.

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[1] The property of which he was allegedly deprived is his membership and office of "Commodore" in the Tarrytown Boat Club, Inc.

## ARGUMENT

### Introduction

Before we make our substantive argument to the Court, we are compelled to point out certain departures by Petitioner from this Court's rules. Petitioner has included items in his appendices which were never before the courts below. These items are *de hors* the record and cannot be considered by this court.

Petitioner's Appendix A through E are prior decisions and orders from the state courts in this matter and are properly before this Court. Appendix F is confusing at best. Appendix G and Appendix H are excerpts from briefs filed in the state courts in this matter and are also properly before this court. Appendix I is a letter to Petitioner's attorney which is dated three days before the date of Petitioner's brief; was never including in any record before any court below; and has never been seen before by Respondents. It is improperly included in the Petition for the above reasons and because it is not "essential to understand the petition."[2]

Petitioner's Appendix J has no place in these proceedings for the same reasons Appendix I is improperly included. Petitioner's Appendix K is an excerpt from a deposition which Petitioner admits in the caption to the appendix was not taken until after the decision in the state trial court which resulted in the appeals. Appendix L are portions of Respondent TARRYTOWN BOAT CLUB's (hereinafter "TBC") Constitution which Petitioner claims were violated by Respondents. Neither K nor L add anything to aid this Court's understanding of the Petition and both should be excluded.

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[2] U.S.Sup.Ct. Rule 14 (i) (vi).

## POINT I

## PETITIONER'S CASE WAS DISMISSED BY THE NEW YORK STATE COURTS BECAUSE HE SUBSTANTIVELY AND PROCEDURALLY FAILED TO ASSERT A VALID AND TIMELY CAUSE OF ACTION AGAINST RESPONDENTS

Petitioner's Appendix L is one in a continuing series of examples directly from the Petition illustrating that there is no federal question involved here and Petitioner is frivolously causing Respondent's to incur additional legal fees in his attempt to satisfy himself that he took this matter "all the way to the Supreme Court!". Whether or not the TBC's constitution was violated is a question for the New York State courts, not the United States Supreme Court.

It is understandable that Petitioner himself refuses to accept that he has lost after being given his day in court; but for an attorney to encourage that and, worse, to cast aspersions against another attorney before the highest court in the land is most disturbing. The law was once known as a "gentleman's profession." No longer is that so; and not merely because the word "gentleman" in this context is not considered politically correct. Too often it happens that one attorney cannot rely on the word of another attorney. Or some attorney will take on a matter even though it is clearly frivolous while other attorneys will refuse.

Here now we have an attorney accusing a brother attorney of things which amount to libel, all in the course of assuaging his client's ego. Perhaps it is because Petitioner's counsel was trained in India; which, from reading Appendix J of Petitioner's brief, seems to be a country with a corrupt legal system. Whatever the reason, there is no excuse for *ad hominem* attacks. A review of the Petition before this Court on its merits leads to only one conclusion, it must be denied.

Pages 20 through 29 of the Petition purport to set forth the reasons for granting a Writ of Certiorari. Reading them shows they contain arguments properly before the state courts and do not contain any hint of a discussion of a federal question.

Another example epitomizing Respondents' claim that this is a request to review substantive and procedural state law and not constitutional law is found in the following quotation from page 19 of the Petition:

> this petition is premised on a plethora of extraordinary and compelling Federal questions . . . that involves judicial decisions based on what appeared to be settled law ("Appearance") when, *per se*, the reality of that settled law was (and still is) just the reverse ("Reality"). [emphasis in original]

Petitioner is saying here for all to see that the New York State courts decided his case on what appeared to them to be the law, but was not. The seven judges of the New York State Court of Appeals, the four judges empaneled at the Appellate Division, and the trial court judge all misunderstood the law . . . if we are to believe Petitioner. And he comes here to this Court to straighten things out. Is this a Federal Question? No.

At page 12 of his brief Petitioner states:

> Appearance of settled law on Statute of Limitations ("Appearance") that CV created caused the State Courts to repeatedly throw out petitioner's first three causes of action as time-barred. (App. D, 4a-6a at 5a).
> Quite to the contrary, reality of settled law thereon is that petitioner had the choice between an Article 78 proceeding (within four months which he did not choose) and plenary action which he timely commenced ("Reality"). [emphasis in original]

Petitioner expands on this at pages 21 through 24 of his Petition, citing New York State court cases. To understand the gist of Petitioner's argument, it must be understood that Article 78 is part of New York's Civil Practice Law and Rules and pertains to judicial review of a decision by a body or officer. The Statute of Limitations under Article 78 is four months and Petitioner had not sought such review within that time.

Respondents argued below that Petitioner was limited to Article 78 review and Petitioner argued below that the case law of New York State permitted him to initiate a plenary action. The state trial court held that Petitioner was limited to an Article 78 proceeding and because of the Statute of Limitations dismissed his claim. On appeal, the Appellate Division affirmed the trial court on this issue. Petitioner now seeks to reargue this state question before this court.

In his final paragraph on page 25 of his Petition, Petitioner claims Respondents "inveigl[ed] our State Courts into not taking judicial notice (thus escaping notice) of settled law on choice of plenary action in case of a corporation and its individual fiduciaries" [emphasis in original]. This is a red herring. The law certainly is settled on this issue and the state court's properly applied it in Respondent's favor.

Petitioner gives Respondents' attorneys too much credit. His attorneys prepared and submitted a brief to the Appellate Division; Respondents' brief was rejected by the Appellate Division because it was offered for filing late. Further, Respondents' attorneys were not permitted oral argument because they failed to file a brief. All copies of the brief were returned to Respondents' attorneys and were not before the appellate court.

How could Respondents' attorneys mis-lead or deceive the appellate court without a brief or oral argument. The Court is respectfully referred to Petitioner's Appendix D at page 4a of the Petition for the decision of the Appellate Division. Beneath the

caption is listed Petitioner's attorney only - Michael H. Sussman. Respondents' attorneys are not listed because they failed to timely file a brief.

Petitioner also seems to conveniently forget that he was represented throughout these proceedings. His attorney filed papers in opposition to the original motion for summary judgment and, in fact, convinced the court that certain of Petitioner's causes of action should not be dismissed at that time for lack of discovery. (See decision at Petitioner's Appendix E, page 7a). As set forth above, his attorney filed the only brief before the Appellate Division on Petitioner's appeal of the trial court's decision.

Following affirmance of the trial court by the Appellate Division, Petitioner retained another attorney who sought reargument of the appeal. Petitioner's new attorney then sought review by the New York State Court of Appeals and reargument of its decision to dismiss his appeal. Certainly, Petitioner has had adequate representation and has taken every opportunity to be heard. He must now accept that he has exhausted his appeals and is not properly before this Court.

## POINT II

## WITHOUT DEPRIVATION OF A FEDERAL RIGHT CAUSED BY THE EXERCISE OF SOME RIGHT OR PRIVILEGE CREATED BY THE STATE OR BY A RULE OF CONDUCT IMPOSED BY THE STATE OR BY A PERSON FOR WHOM THE STATE IS RESPONSIBLE THERE IS NO CONSTITUTIONAL VIOLATION

The teachings of the this Court are particularly enlightening on the applicability of the Fourteenth Amendment and its Due Process Clause. This Court consistently has held that "state action" is required for a Fourteenth Amendment violation, and it has said so in a variety of ways. "Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be." N.C.A.A. v. Tarkanian, 488 U.S. 179, 191, 109 S. Ct. 454, 461, 102 L.Ed.2d 469 (1988) [*citing* Shelley v. Kraemer, 334 U.S. 1, 13, 68 S. Ct. 836, 842, 92 L.Ed. 1161 (1948)]. "The Fourteenth Amendment protects [property] interest[s], however, only from a deprivation by state action." Tulsa Professional Collection Services v. Pope, 485 U.S. 478, 487, 108 S. Ct. 1340, 1345, 99 L.Ed.2d 565 (1988). "Since the [Fourteenth] Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as 'state action'." Lugar v. Edmondson Oil Company, Inc., 457 U.S. 922, 924, 102 S. Ct. 2744, 2747, 73 L.Ed.2d 482 (1982).

The Fourteenth Amendment Due Process Clause offers no shield against private conduct, "however discriminatory or wrongful." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349, 95 S. Ct. 449, 453, 42 L.Ed.2d 477 (1974) [*quoting* Shelley v. Kraemer, 334 U.S. 1, 13, 68 S. Ct. 836, 842, 92 L.Ed. 1161 (1948)]. "The Fifth and Fourteenth Amendments forbid both the Federal Government and the States from depriving any person of

life, liberty or property without due process of law." Bloom v. Illinois, 391 U.S. 194, 195, 88 S. Ct. 1477, 1478, 20 L.Ed.2d 522 (1968). "Only if a State deprives any person or denies him enforcement of a right guaranteed by the Fourteenth Amendment can its protection be invoked." Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 72, 75 S. Ct. 614, 615, 99 L.Ed. 897 (1955).

In Lugar v. Edmondson Oil Company, Inc., supra, this Court discussed its two-prong approach for determining whether conduct allegedly causing the deprivation of a federal right can be fairly attributable to the State:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible. In Sniadach[3], Fuentes[4], W.T. Grant[5], and North Georgia[6], for example, a state statute provided the right to garnish or to obtain prejudgment attachment, as well as the procedure by which the rights could be exercised. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together

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[3] Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S. Ct. 1820, 23 L.Ed.2d 349 (1969).

[4] Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L.Ed.2d 556 (1972).

[5] Mitchell v. W.T. Grant Co., 416 U.S. 600, 94 S. Ct. 1895, 40 L.Ed.2d 406 (1974).

[6] North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S. Ct. 719, 42 L.Ed.2d 751 (1975).

> with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Lugar, at 922, 937, 102 S. Ct. at 2753-54.

Considering the case at hand, Petitioner can point to no evidence showing that he was deprived of property by reason of state action. The record is conspicuously devoid of evidence revealing that the Respondents, either individually or collectively, acted on behalf of the State or pursuant to State authority. Specifically, Petitioner has not shown that his alleged deprivation of property resulted from "the exercise of a right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible. See Lugar, at 922, 937, 102 S. Ct. at 2753-54. There is no evidence showing that the Respondents resorted to State assistance in dismissing Petitioner from the boat club. Nor has Petitioner demonstrated that even a single Respondent is someone who may "fairly be said to be a state actor." See id. For these reasons, it is impossible for the Respondents to have violated the Fourteenth Amendment.

Moreover, the fact that Petitioner sought redress in the courts of New York State will not transform this controversy into one involving state action. "The mere availability of a forum for the resolution of private conflicts does not clothe private litigants with the authority of the state. In re McLouth Steel Corp., 23 B.R. 167, 169 (E.D. Mich., 1982) [*quoting* Henry v. First National Bank of Clarksdale, 595 F.2d 291, 296, *rehearing denied*, 601 F.2d 586 (5th Cir. 1979)]; *see also* Louisville Area Interfaith Committee v. Nottingham Liquors, 542 F.2d 652, 655 (6th Cir. 1976). Use of the state judicial system by Petitioner will not give rise to state action to sustain a due process violation.

Title 42 U.S.C. section 1983 provides a remedy for deprivations of rights secured by the Constitution and laws of the United States when that deprivation occurs under color of law. The statute reads in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. section 1983 (emphasis added). In effect, a plaintiff relying upon section 1983 must show that: (i) he was deprived of a right secured by the Constitution or federal law, and (ii) the defendant deprived him of this right while acting under color of state law. See Lopez v. Department of Health Services, 939 F.2d 881 (9th Cir. 1991); German v. Killeen, 495 F. Supp 822 (D.C. Michigan 1980).

Section 1983 was designed "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." Wyatt v. Cole, 504 U.S. 158, 161, 112 S. Ct. 1827, 1830, 118 L.Ed.2d 504 (1992) [*citing* Carey v. Piphus, 435 U.S. 247, 254-57, 98 S. Ct. 1042, 1047-49, 55 L.Ed.2d 252 (1978). The statute protects "individuals against a misuse of power made possible only because the wrongdoer is clothed with the authority of state law." Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977).

In view of the purpose of section 1983 and its color of law requirement, the class of defendants to which it applies is easily

identified. As in cases arising under the Fourteenth Amendment, the pivotal question in determining whether someone is subject to suit under section 1983 is whether the claimed infringement of federal rights is fairly attributable to the state. Rendall-Baker v. Kohn, 457 U.S. 830, 102 S. Ct. 2764, 73 L.Ed.2d 418 (1982); Lawline v. American Bar Ass'n., 738 F. Supp. 288, 294 (N.D. Ill. 1990), *affirmed*, 956 F.2d 1378 (7th Cir. 1992), *cert. denied*, ___ U.S. ___, 114 S. Ct. 551, 126 L.Ed.2d 452 (1993). "When Congress enacted section 1983 as the statutory remedy from violations of the Constitution, it specified that the conduct at issue must have occurred 'under color of' state law; thus, liability attaches only to those wrongdoers 'who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it. N.C.A.A. v. Tarkanian, 488 U.S. 179, 109 S.Ct. 454, 461, 102 L.Ed.2d 469 (1988) (*quoting* Monroe v. Pape, 365 U.S. 167, 172, 81 S. Ct. 473, 476, 5 L.Ed.2d 492 (1961)].

Purely private conduct, no matter how wrongful, is not within the ambit of section 1983. Ouzts v. Maryland National Insurance Co., 505 F.2d 547 (9th Cir. 1972), *cert. den.*, 421 U.S. 949, 95 S. Ct. 1681, 44 L.Ed.2d 103 (1975). The statute protects federal rights from infringement by persons acting under state authority, but not from infringement by private actors who commit wrongful acts. Spampinato v. M. Breger & Co., 270 F.2d 46 (2d Cir. 1959), *cert. den.*, 361 U.S. 944, 80 S. Ct. 409, 4 L.Ed.2d 363 (1960), *rehearing den.*, 361 U.S. 973, 80 S. Ct. 597, 4 L.Ed.2d 553 (1960); Brownley v. Gettysburg College, 338 F. Supp. 725 (D.C. Pa 1972). Stated succinctly, private actors cannot be sued under section 1983. Sato v. Plunkett, 154 F.R.D. 189, 192 (N.D. Ill. 1994).

Based on the foregoing authorities, a private actor must have some connection with the State in order to violate section 1983. Private actors, for example, may incur liability under section 1983 if the actor is a "willful participant in a joint action with the State or its agents." Adickes v. S.H. Kress & Co., 398

U.S. 144, 152, 90 S. Ct. 1598, 1605, 26 L.Ed.2d 142 (1970) [*quoting* U.S. v. Price, 383 U.S. 787, 794, 86 S. Ct. 1152, 1157, 16 L.Ed.2d 267 (1966)]. Joint activity requires some overt and significant state participation in the challenged action. Tulsa Professional Collection Svcs. v. Pope, 485 U.S. 478, 486, 108 S.Ct. 1340, 1345, 99 L.Ed.2d 565 (1988); Hoai v. Vo, 935 F.2d 308 (U.S.App.DC 1991). Such joint activity requires more than the mere use of a state's judicial system by private litigants in the course of a lawsuit. Earnest v. Lowentritt, 690 F.2d 1198, 1200 (5th Cir. 1982); Hollis v. Itawamba County Loans, 657 F.2d 746, 749 (5th Cir. 1981).

Besides joint activity, the wrongful act of a private party may be attributed to the state if the state has so involved itself in the defendant's action that the state has compelled the action. Starnes v. Capital Cities Media, Inc., 39 F.3d 1394, 1396 (7th Cir. 1994) [*citing* Adickes v. S.H. Kress & Co., 398 U.S. 144, 170, 90 S. Ct. 1598, 1615, 26 L.Ed.2d 142 (1970)]. The requisite state action for a section 1983 claim will not be found if a state merely allows private litigants to use its courts, unless there is corruption of judicial power by the private litigants. McCartney v. First City Bank, 970 F.2d 45, 47 (5th Cir. 1992).

Turning once again to the case at bar, there is absolutely no evidence showing the Respondents herein deprived Petitioner of a federally protected right under color of state law. Assuming that Petitioner's membership in the boat club was a constitutionally protected property interest, nothing in the record even suggests that the deprivation of this interest could be fairly attributable to the State. The boat club is a private club. Petitioner engaged in conduct inimical to the interests of the club. As a result, he was expelled from the club by a 43 to 13 vote of the club's regular members. The members, including the Respondents, did not oust Petitioner under color of any "statute, ordinance, regulation, custom, or usage, of any State". The vote was a purely private matter undertaken by a private club. By no stretch of imagination can the occurrence be deemed anything but a private matter.

A New York State court opinion also is instructive on the applicability of Federal Civil Rights Law and the Fourteenth Amendment to a dispute between a private club and its members. In Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis Int'l., 52 A.D. 906, 383 N.Y.S.2d 383 (2d Dept 1976), *aff'd*, 41 N.Y.2d 1034, 395 N.Y.S.2d 633, 363 N.E.2d 1378 (1977), a local chapter of the Kiwanis permitted women to become members of the club in violation of the constitution and by-laws of the parent organization. When Kiwanis International revoked the chapter's charter, the chapter members sought a declaratory judgment to nullify those provisions of the organization's constitution and by-laws and to reinstate the chapter. The New York State Court of Appeals determined that Kiwanis International is a private club which is not subject to the constitutional standards of the Fourteenth Amendment or the provisions of the Federal Civil Rights Act of 1964. As such, the organization's practice of restricting membership to men only was a valid restriction.

## CONCLUSION

In conclusion, it is clear the Petitioner not shown a constitutional question is directly involved to support an appeal as of right and is simply wasting this court's valuable time.

Petitioner is obviously not satisfied with the decision of the courts of New York State even though he had his opportunity to be heard and was represented by one of the best attorney's in Westchester County. As stated previously in this brief, Petitioner apparently cannot accept his loss and still believes he is right. Taking his case to this, the highest court in the land, is his way of licking his wounds . . . he can now at least tell everyone who will listen that he did not rest until he took his case all the way to the United States Supreme Court.

Unfortunately for other Petitioners with genuine issues for review before this court, Petitions like this clog the system and make it difficult for this Court to get its job done.

Respondents respectfully pray this court deny the Petition for Writ of Certiorari.

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